IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.600 OF 2006

Shri Yashwant Appa Lande,]
Aged 43 years, Occ.Agriculture]
R/o. Ashta, Taluka Walwa,]
District Sangli.] .. Appellant.

versus

1. Chi.Vijaykumar Yashwant Lande]
Aged 11, Occ. Student,]
Minor, through No.2]

2. Sou.Sushila Yashwant Lande]
Aged 36, Occ.Household,]

3. Shri Anna Appa Lande]
Aged 56, Occ. Agriculture]

4. Shri Mallinath Appa Lande]
Age 37, Occ.Agriculture]

5. Smt.Akkatai Appa Lande]
Aged 74, Occ. Agri.& Household]

6. Surendra Anant Magdum]
Aged 65 years.]

7. Sou.Suman Surendra Magdum]
Age 55,]

Nos.1 to 5 R/o. Ashta, Tal.Walwa]
Nos.6 and 7, R/o.Karandwadi]
Tal.Walwa, District Sangli.] .. Respondents.

Mr.R.V.Govilkar with Mr.Abhinandan B. Vagyani for the Appellant.

Mr.Sarang Aradhye for Respondent No.5.

Mr.Ulhas Naik for Respondent Nos. 3 and 4.

Mr.Amit Karande for Respondent Nos. 6 and 7.

Mr.Vikas Mali for Respondent Nos. 1 and 2.

ALONG WITH
SECOND APPEAL NO.657 OF 2007

Smt.Akkatai Appa Lande] .. Appellant
Aged 74, Occ. Agri.& Household] (Org.Resp.No.5)
R/o.Ashta, Tal.Walwa,]
Dist.Sangli]

versus

1. Shri Yeshwant Appa Lande,]
Aged 43 yrs., Occ.Agriculture]
R/o. Ashta, Taluka Walwa,]
Dist Sangli.]

2. Chi.Vijaykumar Yeshwant Lande]
Age 11, Occ. Student,]
Minor, through No.3]

3. Sou.Sushila Yeshwant Lande]
Age 36, Occ.Household,]
C/o.Yeshwant Satyappa Sarade]

4. Shri Anna Appa Lande]
Age 56, Occ. Agriculture]

5. Shri Mallinath Appa Lande]
Age 37, Occ.Agriculture]

Nos.2 to 5 R/o. Ashta, Tal.Walwa]
District Sangli.] .. Respondents.
(Orig.Appellant
6. Surendra Anant Magdum] & Orig.Resp.
Age 65] 1 to 4 & 6-7)

7. Sou.Suman Surendra Magdum]
Age 55,]

Nos.6 and 7, R/o.Karandwadi]
Tal.Walwa, District Sangli.]

Mr.Sarang Aradhye for the Appellant.

Mr.Ulhas T.Naik for Respondent Nos. 4 and 5.

Mr.Vikas Mali for Respondent Nos.2 and 3.

Mr.Amit Karande for Respondent Nos.6 and 7.

CORAM : A.S.OKA, J.

DATED : 11/09/2007.

JUDGMENT :

1. Both these Second Appeals appeared before this Court on earlier occasions. Learned counsel appearing for the parties agreed that both the appeals should be disposed of finally on the basis of substantial questions of law raised by the Appellant in Second Appeal No.600 of 2006. Accordingly, yesterday, I have heard the submissions of the learned counsel appearing for the parties. Second Appeal No.600 of 2006 has been filed by the original 1st Defendant and, Second Appeal No.657 of 2007 has been preferred by the original 4th defendant. For the sake of convenience I have referred to the parties in this judgment with reference to the status of the respective parties in the original suit.

2. It will be necessary to refer to the facts of the case in brief with a view to appreciate the submissions made by the learned

counsel for the parties. One Appa Bala Lande died on 14.9.1983. The 1st Defendant Yashwant Appa Lande, the 2nd Defendant Anna Appa Lande and the 3rd Defendant Mallinath Appa Lande are the three sons of deceased Appa. The 4th Defendant Akkatai Appa Lande is the widow of deceased Appa. The 1st Plaintiff is the son of 1st Defendant Yashwant and, the 2nd Plaintiff is the wife of 1st Defendant. At the time of institution of the suit, the 1st Plaintiff was a minor and, the 2nd Plaintiff filed the said suit for herself and on behalf of 1st Plaintiff in the capacity of Next Friend and Guardian. In the plaint, the Plaintiffs have alleged that the suit properties are ancestral properties at the hands of the Defendants. It is stated that the suit properties have not been partitioned after the demise of said Appa. There are allegations made against the 1st Defendant on the basis of matrimonial dispute between the 2nd Plaintiff and the 1st Defendant. It is stated that the 1st Defendant was not maintaining the Plaintiffs. It is alleged that the 1st Defendant has a mistress by name Suman. The Plaintiffs alleged that as the suit properties were not partitioned, the Defendants were having 1/4th share each and being

the son and wife of 1st Defendant, the Plaintiffs were having 1/3rd share each in the 1/4th share of the 1st Defendant.

3. The suit was contested by the 1st Defendant by filing his written statement. The first contention raised by the 1st Defendant is that after the demise of Appa, there was oral partition amongst the Defendants in the year 1986 and the parties are in separate possession of their respective shares. The 1st Defendant denied the various averments made in the plaint. In the written statement it is stated that the 4th Defendant has agreed to sell the share in the property allotted to her in the partition of 1986 in favour of one Anna Dada Awati. However, the sale deed has not been executed. The written statement of the 1st Defendant was adopted by the other Defendants.

4. The Trial Court held that the suit property is the ancestral and joint family property and, mutation entry in the name of the Defendants are reflected only for the sake of convenience. The learned Trial Judge has held

that the Plaintiffs were entitled to 2/3rd share in the 1/4th share of the 1st Defendant. Therefore, the Trial Court passed a decree directing that partition of the property shall be effected by the Collector or any gazetted subordinate. The Trial Court further directed that Court Commissioner should be appointed for partitioning the house property. It must be noted here that the Trial Court dismissed the suit in respect of the property described in Paragraph 1-D of the plaint.

5. An appeal was preferred by the 1st Defendant to the District Court. It must be noted here that no other party to the suit has preferred any appeal or cross objection. While dismissing the appeal, the Appellate Court made modification on the basis of subsequent events. The Appellate Court has noted that during the pendency of appeal, the matter was sent for effecting partition to the Collector as per Section 54 of the Civil Procedure Code and, accordingly the partition has been effected and possession receipt has been issued on 17.5.2002. The Appellate Court noted that the Respondent Nos.6 and 7, who were subsequently added as the

Respondents in the appeal, had purchased the share of the 4th Defendant in the suit property. The Appellate Court, therefore, directed that the Respondent Nos.6 and 7 in the appeal will be entitled to obtain possession of only that land which has been allotted to the share of the 4th Defendant-Akkatai in the partition effected by the Collector on the basis of the decree.

6. Mr.Govilkar, the learned counsel appearing for the Appellant in Second Appeal No.600 of 2006, has made extensive submissions. He submitted that there is a confusion created by the findings recorded by the Trial Court in paragraph 15 of the Judgment. He submitted that the trial Court is not sure, whether the suit properties are the ancestral properties or joint family properties in the hands of deceased Appa Bala Lande. He further submitted that during the life of 1st Defendant Yashwant, his son and wife will not get any share and they will get the share in the undivided share of the 1st Defendant only after the demise of 1st Defendant in view of Section 6 of the Hindu Succession Act, 1956. He submitted that in any event the 2nd Plaintiff, being the wife of 1st Defendant, was not entitled

to file the suit for partition and was not entitled to any share in the suit properties. He submitted that the suit was filed by the 2nd Plaintiff on behalf of the 1st Plaintiff and, therefore, the suit itself was not maintainable. He submitted that in fact there was a partition effected after the demise of Appa Lande and the first four defendants were in separate possession in respect of their respective shares allotted to them. He invited my attention to the various grounds raised in the Memorandum of Appeal filed before the appellate Court. The learned counsel appearing for the Appellant in Second Appeal No.657 of 2007 adopted the submissions made by the learned counsel appearing for the Appellant in Second Appeal No.600 of 2006. The learned counsel appearing for the Respondent Nos.6 and 7 have supported the Appellants. The learned counsel appearing for the original Plaintiffs supported the impugned judgment and decree.

7. I have carefully considered the submissions made by both the sides. A perusal of judgment of the Appellate Court shows that the contention which is sought to be raised in the Second Appeals that the Plaintiffs are not

entitled to share in the suit properties during the life time of the 1st Defendant has not been raised before the Appellate Court. The said contention is not specifically referred to in the judgment of the Appellate Court and there is no discussion on this aspect. It must be noted here that in Paragraph 12, the Appellate Court has recorded the submission of the learned counsel appearing for the 1st Defendant that Plaintiff No.2 could not have acted as a Guardian of Plaintiff No.1 when the father of Plaintiff No.1 alive. The said submission has been dealt with by the appellate Court in Paragraph Nos.12 to 15. In Paragraph No.16 of the judgment, the Appellate Court observed that though there are certain irregularities in presenting the plaint as the 2nd Plaintiff was not entitled to ask for partition, but she can get share in the partition when the partition is opened. In Paragraph No.17 the Appellate Court has observed that the parties have fought litigation as if it was a matrimonial dispute between the 2nd Plaintiff and the 1st Defendant. From Paragraph No.18 to Paragraph No.25, the Appellate Court has dealt with the contentions raised by the 1st Defendant as regards the partition effected in the year 1986.

In Paragraph No.25 there is a specific finding recorded by the Appellate Court that the theory of oral partition effected in the year 1986 has not been established. Even in Paragraph No.26 the Appellate Court has dealt with the same submission. In Paragraph No.27 the Appellate Court has recorded that the Trial Court was right in passing the decree and, Paragraph No.28, which is the last paragraph of the judgment, is about adjusting equities claimed by the purchasers.

8. Learned counsel Shri Govilkar invited my attention to the Points for determination framed in Paragraph No.7 of the Appellate Court's Judgment and, he pointed out that the Point No.1 "Whether the Appellant has established oral partition of 1986" has been answered in the affirmative. He, therefore, submitted that the order of remand deserves to be passed. I, have, therefore, perused the certified copy of the judgment of Appellate Court. I find that in Paragraph No.7 the column "Findings" has been kept blank against Point No.1 and, answer "Yes" is mentioned against Point No.2. Therefore, there is no inconsistency between what is recorded in Paragraph No.7 and in the body of

Judgment. In any case, the submission made by the 1st Defendant regarding oral partition has been extensively dealt with by the Appellate Court and a finding has been recorded that the 1st Defendant has failed to prove the oral partition. In any case, that finding is not the subject matter of challenge in these Second Appeals.

9. For dealing with the 1st submission made by Shri Govilkar, it was necessary to refer to the averments made in the plaint. In Paragraph No.3 of the plaint, it is asserted that the suit properties are ancestral properties of the Plaintiffs and Defendants. While dealing with Paragraph No.3 of the Plaint, in Written Statement of the 1st Defendant, there is no specific denial of the averments made in Paragraph No.3 of the Plaint that the suit properties are ancestral properties. On the contrary, a contention has been raised that after the demise of Appa there was oral partition effected between the parties. I have perused the deposition of the 1st Defendant. In his Examination-in-Chief the 1st Defendant has not

come out with the case that the suit properties were self acquired properties of deceased Appa. Moreover, no contention appears to have been raised by the 1st Defendant before the Appellate Court that the properties were not the ancestral properties. The Trial Court has, therefore, found that the son the 1st Defendant was entitled to claim a share in the suit properties equal to that of the share of his father. The 1st Plaintiff acquires a share in the properties equal to that of his father on his birth. It is well settled law so far as Hindu Law is concerned, that a wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. A useful reference in that behalf can be made to Clause 315 of Volume-I of Mulla's Hindu Law (17th Edition).

10. Thus, the 1st Plaintiff could have always claimed partition and when the partition is effected at the instance of 1st Plaintiff, the 2nd Plaintiff will get a share equal to that of the 1st Plaintiff. As pointed out earlier, there

was no specific submission made before the Appellate Court that the 2nd Plaintiff was not entitled to any share.

11. The Appellate Court has dealt with an argument that the 2nd Plaintiff could not have acted as a Guardian of the 1st Plaintiff. The Appellate Court has referred to Section 6 of the Hindu Minority and Guardianship Act, 1956 and has held that the provisions of the said Act relate to only the minor's own property. The Appellate Court in my view, has rightly come to the conclusion that there was no error in the 2nd Plaintiff representing the 1st Plaintiff in the suit for partition filed by the 1st Plaintiff. Therefore, none of the grounds raised in the Second Appeal No.600 of 2006 have any merit and in any event, no substantial question of law has arisen for determination before this Court.

12. Coming to the appeal preferred by Original Defendant No.4. It is an admitted position that even before the Collector, who partitioned the properties as per the decree of the Trial Court, the 4th Defendant transferred her share in the suit properties in favour of the

Respondent Nos.6 and 7 in the appeal. The contention raised in the said Second Appeal is that already there was a partition effected between the parties in the year 1986. The second contention raised is that the suit land bearing Survey No.132/1+2 was given to the 4th Defendant for her maintenance till her death and, there she has become absolute owner of the said property and the said property could not have been subjected to partition.

13. It must be noted here that the Trial Court passed a decree in respect of the aforesaid property. The Trial Court did not accept the case made out by the Defendants regarding the partition allegedly made in the year 1986. The decree of the Trial Court was not challenged by the 4th Defendant by preferring any appeal before the District Court. Thus, the 4th Defendant accepted the decree of the Trial Court by not preferring any appeal. Therefore, it is not open to the 4th Defendant to raise the contentions which are sought to be raised in the second appeal as the said Defendant has accepted the decree passed by the Trial Court by not challenging the same.

14. The Respondent Nos.6 and 7 in the Second Appeal are the purchasers of the share of 4th Defendant. In Paragraph No.28 of the Judgment of Appellate Court, it is recorded that during pendency of the appeal, the Collector effected the partition on the basis of the decree of Trial Court. This factual aspect has not been disputed by any of the parties before this Court. Learned counsel for the Respondent Nos. 6 and 7 admitted that the 4th Defendant purported to transfer her right, title and interest in favour of the said Respondents before the Collector effected the partition by metes and bound. As held by the Trial Court and confirmed by the Appellate Court, the 4th Defendant had 1/4th undivided share in the suit properties in respect of which a decree has been passed. As stated earlier, the 4th Defendant has failed to establish that one of the properties was her absolute property. That contention has no merit because the decree of the Trial Court of the partition of the said property has not been challenged by the 4th Defendant by preferring any appeal before the District Court. Considering all these aspects, the Appellate Court has modified the decree passed by the Trial

Court by directing that the purchasers through Defendant No.4 Akkatai i.e. the Respondent Nos.6 and 7 herein will get the property which is allotted in partition to the share of the 4th Defendant. Thus, the Appellate Court has adjusted the equities by holding that the purchasers who are claiming through one of the parties to the suit for partition, will get the share allotted to the said party in the partition. Thus the 6th and 7th Respondents will be become entitled only to the property allotted to the share of the 4th Defendant by the Collector.

15. At this stage, it must be stated that the learned counsel appearing for the Appellant tried to make a grievance about the manner in which the partition has been effected by the Collector during pendency of the appeal. Admittedly, the partition has been effected by the Collector on the basis of the decree passed by the Trial Court by exercising the powers under Section 54 of the Code of Civil Procedure, 1908. If any of the party has any grievance about the mode and method in which the partition has been effected by the

Collector, it is obvious that different remedies under law are available to the said party and that aspect cannot be gone into in Second Appeal, as the challenge in the Second Appeal is confined to the decree passed by the Courts below.

16. Considering the aforesaid discussion, it is obvious that there is no merit in these Second Appeals and subject to what is stated above, both the Second Appeals are liable to be dismissed. Accordingly Second Appeal Nos.600 of 2006 and 657 of 2007 are dismissed with no order as to costs.

[A.S.OKA, J.]